

UNITED STATES OF AMERICA,
Plaintiff,
v.
NORTHWEST AIRLINES, CORP., and
CONTINENTAL AIRLINES, INC.
Defendants.

**OPPOSITION OF THE UNITED STATES
TO DEFENDANT NORTHWEST'S MOTION, IN THE ALTERNATIVE,
TO EXCLUDE THE TESTIMONY OF SUN COUNTRY AIRLINES**

Northwest does not take “no” for an answer when it requests this Court to preclude the United States from introducing evidence on the existence of barriers to entry that would deter other airlines from establishing new hubs at existing Northwest or Continental hubs or initiating new services on Northwest/Continental hub to hub routes. On three previous occasions, it sought to exclude evidence on barriers to entry.¹ The Court denied its requests all three times; but Northwest is back in court hoping that the fourth time will be a charm. This motion, like the three that

¹Northwest previously moved to exclude testimony concerning barriers to entry by executives from Sun Country and other airlines on the United States' witness list, to exclude all testimony from the United States' expert witnesses (including testimony on barriers to entry), and to reconsider the Court's denial of its motion to exclude the airline executives' testimony.

preceded it, should be rejected.

In considering the previous motions, the Court recognized that testimony from Paul Miller, Sun Country's Vice-President for Market Planning, and the other airline executives on the United States's witness list is relevant, material and admissible under all applicable rules of evidence and procedure. Now, Northwest requests that the Court exclude Mr. Miller's testimony if Mark Travel -- a company that Northwest asserts is owned in common with Sun Country -- does not give it copies of subpoenaed documents that appear to discuss sensitive commercial relationships between Sun Country and Mark Travel.

It is far too late in the day for Northwest to be demanding discovery from anyone -- much less someone who is neither a party nor a witness. Northwest filed this motion approximately 19 months after the April 2, 1999 deadline for serving document requests and interrogatories on parties; 11 months after the December 3, 1999 deadline for conducting most fact depositions; 12 months after the scheduling order recognized a limited exception to the December 3, 1999 deadline for fact witnesses designated as trial witness; and more than two weeks after the trial began. Second Revised Scheduling Order (Oct. 27, 1999). Moreover, it declined to exercise its right to depose Mr. Miller (who was included on the United States' September 19, 2000 preliminary witness list), thereby foregoing the opportunity to seek information concerning Sun Country/Mark Travel relationships from a witness.

This motion is reminiscent of Northwest's request to belatedly depose Continental witnesses because it claimed to have been surprised by their views on supposed links between Northwest's ownership of equity in Continental and the success of their alliance. Recognizing that Northwest had sat on its rights to make timely discovery requests, the Court denied its untimely

request to depose Continental witnesses shortly before trial began. Trial Transcript for October 16 and October 17, 2000 at p. 44. With respect to Mark Travel, however, Northwest took this course of action one step further, by sitting on its rights to obtain information about Mark Travel/Sun Country relationships until after trial had begun. Its belated request to conduct this discovery should be rejected as well.

Even if the Court were to rule that Northwest is entitled to issue a subpoena to Mark Travel,² however, Northwest still would not be entitled to the alternative relief that it seeks. Federal Rule of Civil Procedure (Fed. R. Civ. P.) 45(e) sets forth the sanctions for failing to obey a subpoena. If the Court denied Mark Travel's motion to quash, and Mark Travel thereafter refused to comply with the subpoena, perhaps Mark Travel could be punished for contempt; but there is nothing in the rules that authorizes the Court to preclude Mr. Miller's testimony, or to otherwise punish the United States or Sun Country, for any transgressions by Mark Travel that might occur if it failed to obey Northwest's subpoena.³

²The United States relies upon Mark Travel to address the issues of whether the subpoena is overly broad or burdensome, or improperly seeks sensitive confidential information, as it is in the best position to make these points. Likewise, the United States does not take a position, at this time, on Northwest's document demands (dated November 6, 2000) to JetBlue and Frontier, because they do not include requests to exclude the JetBlue and Frontier executives' testimony at trial. Our observations about the untimely nature of Northwest's discovery demands on Mark Travel, however, apply with equal force to its discovery demands on JetBlue and Frontier.

³All sanctions set forth in Fed. R. Civ. P. 37 that limit the introduction of evidence apply only when parties refuse to comply with legitimate discovery demands. Since Mark Travel is not a party, Northwest cannot rely on this rule to support its request to exclude Mr. Miller's testimony.

Therefore, the United States respectfully requests that the Court deny Northwest's motion,
in the alternative, to exclude the testimony of Paul Miller.

Respectfully submitted,

"/s/"

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"/s/"

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